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No. 90-747

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Haiti, a nation with a lengthy history of political repression, entered into a program with the United States whereby (a) the United States interdicted vessels carrying Haitian aliens and returned those aliens to Haiti, and (b) the United States maintains it monitored Haiti's promise not to persecute the returnees. State Department officials claim to have interviewed close to 600 returnees in Haiti and stated publicly to the press and in connection with political asylum proceedings that returnees have not suffered persecution in Haiti. Respondents seek to obtain under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the names and addresses of the supposedly interviewed returnees to further public interests in assuring the safe relocation of the returnees, in ascertaining whether the United States is monitoring properly Haiti's obligation not to persecute the returnees, in determining whether the United States has been truthful regarding stated lack of persecution, and in providing fair and consistent political asylum proceedings in this country. The question presented is:

> Whether Petitioner, the State Department, properly refused to disclose the names and addresses of the allegedly interviewed Haitian returnees under FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), which protects only "a clearly unwarranted invasion of personal privacy," when the State Department has not raised any significant privacy interests to be protected and when the public interests in disclosure are substantial.

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v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

I. Background

The fate of Haitian applicants who seek political asylum in the United States is largely dependent upon advisory opinions provided by the State Department's Bureau of Human Rights and Humanitarian Affairs ("BHRHA") to the Immigration and Naturalization Service ("INS") and the Executive Office for Immigration Review ("EOIR").

The State Department claims that its advisory opinions are based, *inter alia*, on its "analysis of country conditions and other relevant factors." R. 97-Ex. 1. A typical State Department advisory opinion from March, 1989 for an asylum applicant from Haiti states:

> We have no evidence that hundreds of Haitian emigrants who are returned to their homeland each year are persecuted by the government of Haiti, and we are unimpressed by unsubstantiated assertions to the contrary. While individual Haitian emigrants may have problems for individual reasons, no pattern of persecution exists. Pl. Ex. 1; R. 121, p. 16, R. 97-Ex. 1.

An earlier advisory opinion from July, 1987 recommended against political asylum on a different ground:

> The applicant cited, as the basis for a fear of persecution, conditions which pertained under the government of former President[for-life] Jean Claude ["Baby Doc"] Duvalier. With the resignation of that government on February 7, 1986, and the disbanding by official decree of the "Volunteers for National Security," known as the "Ton Ton Macoutes," the grounds on which the applicant based the alleged fear of persecution no longer exist. The present government has demonstrated its commitment to treat all Haitians in accordance with the law. R. 55-Ex. B.

In contradiction to statements made in its advisory opinions, the State Department now admits that during all relevant time periods Haiti has endured "a lengthy history of political repression" (Pet.Br. 3) in that Haiti has "suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2). The State Department's current observations comport with

reports by many observers from the *New York Times* and CBS *60 Minutes* to the United Nations.[1]

The law is plain that political asylum applicants "shall be given an opportunity to inspect, explain and rebut" the advisory opinions. Title 8 C.F.R. § 208.10(b) (1990). Furthermore, INS deportation procedures, governed by 8 U.S.C. § 1252(b), provide that aliens have the right to present evidence and to receive a reasonable opportunity to examine the evidence against them. However, "there are no discovery procedures provided by INS regulations" and "FOIA is essentially the only procedure which aliens can use to obtain from the INS information relevant to their cases." *Mayock v. INS*, 714 F.Supp. 1558, 1560 (N.D. Cal. 1989) (9th Cir. appeal pending on other grounds). *See also* authorities cited in *Mayock, supra*, 714 F.Supp. at 1560 n.1.

It is against this backdrop that Respondents first requested under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the names of individuals returned to Haiti ("returnees") as part of an interdiction program, who the State Department claims, based upon alleged interviews, have not been persecuted since their return.[2] After patiently waiting without results for

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[1] *See, e.g.*, "Is Duvalier Really Gone?," Vol. XX, 60 Minutes, (No. 7, Nov. 1, 1987), and more recently, Vol. 2 HAITI Insight, 1 (No. 6, Nov./Dec. 1990) ("Haunting the electors' memories is the experience of November 1987, when scores of would-be voters were slaughtered as they approached the polls, and the elections were cancelled by the military government in favor of fraudulent elections seven weeks later. In the months leading up to November 29, 1987, two presidential candidates and hundreds of ordinary Haitians were killed, and the electoral council's offices were burned to the ground . . . . Almost 700 monitors representing the United Nations and the Organization of American States . . . will be monitoring the elections" in attempts to avert violence).

[2] Respondents sought the names to rebut the State Department advisory opinions. The State Department's attorney conceded that the "information is dated. . .[thus,] information about conditions in 1983 is just not likely to be applicable to the situation in '86 or '89 when the [respondents] requested that information." J.A. 66.

However as recently as April 1991, the State Department continues to rely on these interviews to conclude that Haitians fleeing Haiti do not face persecution

the State Department to comply with this request, Respondents eventually filed this lawsuit to force the agency to comply with its statutorily mandated obligations. J.A. 1. Both the District Court (Pet.App. 29a and 33a, 725 F.Supp. 502 and 505) and the Eleventh Circuit (Pet.App. 24a, 908 F.2d 1549) ordered the State Department to provide Respondents with the names of the returnees.

II. The FOIA Requests

The FOIA requests at issue emanate from statements made by United States officials that the returnees have not been persecuted. In February 1984, the State Department sent telegrams to various agencies, including the INS, seeking to publicize to "target audiences" that the agency "knows" that Haitians "would [not] be mistreated or persecuted should they return to Haiti." J.A. 67. The State Department's target audiences were "the Haitian community in the US . . . who truly want to return to their families [in Haiti] but are deterred by false information foisted on them for political reasons." J.A. 68.

About ten months later, a banner headline story in *The Miami Herald* reported that the INS had "sent a team of investigators

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if returned to Haiti. *See e.g.:* Appendix attached hereto at 1a, for a report entitled "SITUATION IN HAITI" from the State Department, attached to advisory opinion letters during 1991. While this information is not in the record before this Court, Respondents hereby request that the Court take Judicial Notice of these materials. Certified copies of these documents from the Executive Office for Immigration Review have been lodged with the Court. *See: e.g. Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 742 n.4 (1976).

to Haiti" in order to find out why Haitians were fleeing to the United States in reported record numbers.[3] J.A. 32-33. One State Department official speaking to *The Miami Herald* with guaranteed anonymity stated that "[t]he word is out that it is worth a try [to come to the United States] . . . . If you're caught by the Coast Guard, you're treated well and you're not prosecuted by the Haitian government when you're returned." J.A. 34.

In February, 1985, Respondent Ray filed a FOIA request with the INS for all written INS interview reports concerning persecution, or lack thereof, suffered by the returnees. J.A. 21, ¶ 34.[4]

Apparently following up on the February, 1984 State Department telegrams seeking publicity (J.A. 67-68), the Miami INS District Director and the Commissioner of the INS attempted to convey the State Department message, that returnees face neither persecution nor mistreatment, by speaking with the Editorial Board of the *Miami News*. The ensuing editor's column stated that the Director and the Commissioner "made all the proper statements to shore up their argument that Haitians being sent back by U.S. authorities simply are allowed to blend into the countryside without so much as a wrist-slap for their efforts to flee to the United States." J.A. 28. Moreover, "[t]o stress how much he believes that, [the Miami INS District Director] even offered to provide names of 600 Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly." *Ibid.*

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[3] According to *The Miami Herald* story:

> The Coast Guard interceptions of Haitians at sea are way up: In 1982 they caught 152 Haitians. In 1983, it was 651. This year [1984], through Dec. 3, a total of 3,706 - with more than a third of them since November. And that's not including at least 400 Haitians captured on the way to Florida or upon arrival since Dec. 3. J.A. 34.

[4] Respondents Audate, Nicolas and Louiseau submitted FOIA requests similar to Mr. Ray's in 1987. J.A. 22-23, ¶¶ 41-44.

Respondent Ray, in March 1985, took the Miami INS District Director up on his offer and filed a FOIA request for a comprehensive list of the 600 Haitians. J.A. 19, ¶ 20.

III. Agency Response And Resulting Litigation

Rather than provide the records, which the INS claimed it could not find, the INS responded to the request for 600 names by maintaining that the INS District Director "has stated that he was misquoted by the *Miami News*." J.A. 19, ¶ 21. In response to the FOIA request about the written INS interview reports on Haitian returnees, the INS stated that Mr. Ray should submit his request to the State Department in Washington D.C. J.A. 21-22, ¶ 36. Mr. Ray submitted his request to the State Department on June 12, 1985. J.A. 22, ¶ 39. The State Department asserted on July 30, 1985 that it would "make every effort to provide [Mr. Ray] with the requested information in as timely a manner as possible." R. 1-Ex. I.

Despite the July 30, 1985 assurances that the State Department would provide the information "in as timely manner as possible," no records were released. R. 9. Accordingly, Respondents filed suit under FOIA against the INS and the State Department in November, 1986. R. 1. All defendants filed a motion to dismiss in January 1987 to which they attached the State Department's *Country Reports on Human Rights Practices for 1985*, as evidence in support of their allegation that the "number of Haitian returnees referred to (600) [by the Miami INS District Director in the *Miami News* editorial] that have not suffered persecution is confirmed by U.S. Embassy interviews of 582 returnees to Haiti." R. 10-5.[5]

[5]The passage relied on states:

Follow-up trips to the Haitian countryside by the Creole-speaking returnee officer of the U.S. Embassy continue to demonstrate . . . that the Government is honoring its commitment not to harass or persecute Haitians who have illegally left the country and then been returned. In the first 9 months of 1985, 582 returnees were interviewed and no one alleged persecution or intimidation

In March, 1987, nearly two years after Mr. Ray's first FOIA request, the State Department reported that it could not locate "documents that are responsive to your request." The State Department then directed Mr. Ray back to the INS by stating that the "material which may be responsive to your request may be contained in the record systems of the Immigration and Naturalization Service. If you wish to pursue your inquiry, you should write to [that agency]." J.A. 20, ¶ 28, R. 36-Ex. I.

Just one month after the State Department reported that no records could be found, the State Department informed Mr. Ray that his FOIA request had been "reopened" and the agency "is presently formulating a response." R. 24-2. Then, about two months later, the State Department advised Mr. Ray that the agency finally had initiated searches of two additional records systems including "the Central Foreign Policy Records [the principal record system of the Department of State] and the Bureau of Inter-American Affairs." R. 44-Ex. A.

On July 3, 1987, nearly 25 months after Mr. Ray first requested the information from the State Department regarding the interviews of the returnees, Mr. Ray received 25 documents on this subject. However, 17 of these documents contained redactions ranging in size from one line to nearly one page. The State Department had redacted the names and addresses of the returnees -- the very heart of the information which Mr. Ray requested. R. 44-Ex. A.

IV. The District Court Decision

In September, 1987, Respondents filed a motion in the District Court for an order requiring the State Department to release the unredacted interview documents. R. 44. The State Department opposed the motion and filed a supplemental motion for summary judgment based on FOIA Exemption 6. 5

by the Haitian government. U.S. Department of State, 99th Cong., 2d Sess. at 579 (Jt. Comm. Print 1986). R. 10-Ex. at 579.

U.S.C. § 552(b)(6). The State Department relied on the declaration of John Eaves in an effort to show a clearly unwarranted invasion of personal privacy. J.A. 40-47. Mr. Eaves did not document factually any true invasions of privacy, and only referred to speculative "possible embarrassment." J.A. 43, ¶ 8. Furthermore, Mr. Eaves did not point to specific promises of confidentiality supposedly made to the returnees and referred only to an informal "understanding." J.A. 42-43, ¶ 8.[6]

In ruling on the motions, the District Court understood that "[w]here a FOIA request triggers a claim of exemption under the Act, the burden is on the agency to demonstrate the basis for nondisclosure." 725 F.Supp. at 504. The Court further recognized that:

> There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. An agency cannot withhold material based on conclusory allegations of possible harm; it must show specific detailed proof that disclosure would defeat, rather than further the purposes of the FOIA. In determining whether the disclosure constitutes a "clearly unwarranted invasion of personal privacy, the Court must "employ a balancing test, weighing an individual's right to privacy against the public right to disclosure of government information."
>
> The degree of invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. *Id.* (Citations and footnote omitted.)

[6]Furthermore, the State Department admits that the names were obtained from interdicted vessels which the United States returned to Haiti. Pet.Br. 4. According to the Haitian Migrant Interdiction Operation ("HMIO") Guidelines, it is the practice of the Immigration and Naturalization Service to provide the names and addresses of the interdictees to U.S. Embassy representatives in Haiti "for disposition to the Haitian authorities". *See:* attached Appendix at 5a. Although these are not in the record before this Court the HMIO Guidelines were obtained from another Freedom of Information Act lawsuit. Respondents request this Court to take Judicial Notice of these materials as Certified copies of the trial exhibit list and of the Guidelines have been lodged with this Court. *See: e.g. Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 742 n.4 (1976).

After carefully reviewing the evidence in balancing any invasion of privacy against the public's right to disclosure, the District Court found that "[a]ny invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation" and "this county's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians." *Id.* at 505. The Court further found that the alleged "promise of confidentiality by the State Department is only one factor to be considered and, in this case, is not determinative of the outcome." *Id.* The Court concluded that by weighing the privacy interests against the public interests, "the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal." *Id.*

As late as March, 1989, and after the District Court's judgment ordering disclosure of the names of the returnees, the State Department for the first time sought by motion to invoke FOIA Exemptions 1 and 7. R. 17.[7] The District Court ruled that these exemptions had been waived. 725 F.Supp. at 505. The Court found:

> [R]ather than exhibit due diligence the government has been neglectful in this matter by failing to raise these exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information .... The government has only attempted to "play cat and mouse by

[7]The State Department filed the declarations of Richard Melton (J.A. 53-58) and Pratt Byrd (J.A. 59-64) in an effort to support newly claimed Exemptions 1 and 7. Neither of these declarations added anything to Mr. Eaves declaration on the issue of invasion of privacy.

withholding its most powerful canon until after the district court has decided this case and then springing it on surprised opponents and the judge." *Id.* at 505-506. (Citations omitted).

V. The Eleventh Circuit Decision

The Eleventh Circuit "affirm[ed] the district court's judgment in all respects." 908 F.2d at 1553. In reaching this holding, the Court employed the following analysis:

> Because FOIA is a "broad disclosure statute which evidences a 'strong public policy in favor of public access to information in the possession of federal agencies,'" the disclosure requirements of FOIA must be construed broadly and the exceptions narrowly. Documents are presumed to be subject to disclosure; when the government seeks to invoke an exemption, it bears the burden of proving that the exemption applies.
>
> In determining whether Exemption 6 applies we apply a balancing test, "weighing an individual's right to protection of privacy against the public's right to disclosure of government information." *Id.* at 1554. (Citations omitted).

The Eleventh Circuit "agree[d] with the district court that 'the balance tilts in favor of disclosure,'" even though the alleged invasion of privacy was considered to be more than *de minimis*, and even in light of the alleged promise of confidentiality. *Id.* [8]

Under this Court's reasoning in *United States Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 103 L.Ed. 2d 774, 109 S.Ct. 1468 (1989), and *Department of the Air Force v. Rose*, 425

[8]The issue of the alleged promise of confidentiality was considered "a factor that adds weight to the privacy interests at stake here, but is not a factor that compels us to prohibit disclosure in this case." 908 F.2d at 1554. (Citations omitted).

U.S. 352, 48 L.Ed. 2d 11, 96 S.Ct. 1592 (1976), the Eleventh Circuit found an overriding and great public interest in disclosure of the returnees' names:

> [P]laintiffs . . . seek the information in order to learn whether our government is honest to the public about Haiti's treatment of returnees. They dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information. *We consider these to be matters of great public interest significant enough to outweigh the privacy interests of the Haitian returnees.*
>
> *The government concedes that there exists "a legitimate public interest in the safe relocation of Haitians."* Initial Brief for the Government Agencies at 41 . . . . [T]he identifying information will give the plaintiffs a means to obtain "public interest" information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti . . . . [T]hat factor . . . convinces us that *the information sought here is imbued with a significant public interest because it is a means for the public to see what its government is up to regarding the relocation of Haitians and what it is telling the public on this matter.* *Id.* at 1555. (Emphasis added).

The Eleventh Circuit noted that its "holding here is not inconsistent with *Reporters Committee*." *Id.* at 1556. The Court reasoned that:

> Nothing in *Reporters Committee* precludes the possibility that a FOIA request about a private individual may involve legitimate public interests; that case only explains that in the typical case where an individual seeks information about another individual, legitimate FOIA purposes are not involved. We consider this to be an atypical case. The plaintiffs herein seek information about individuals that will help them to scrutinize what our government is

doing and saying regarding Haitians who unsuccessfully attempt to flee to this country. This is an important public interest - the kind which Congress had in mind in framing FOIA. *Id.*[9]

The Eleventh Circuit also affirmed the District Court's ruling that Exemptions 1 and 7 were waived by the State Department. The Court found "it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs." *Id.* at 1557. (Emphasis in original).[10]

SUMMARY OF ARGUMENT

The central purpose of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, is "the general philosophy of full agency disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("S. Rep. No. 813"). Indeed, the section of the FOIA Senate Report entitled "Purpose of Bill" quotes the following language from James Madison:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. S. Rep. No. 813 at 2-3.

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[9]The Eleventh Circuit, 908 F.2d at 1556, also distinguished *Federal Labor Relations Auth. v. U.S. Dep't of The Treas., Financial Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 863 (1990), and *National Ass'n of Retired Federal Employees v. Horner* ["*NARFE*"], 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1805 (1990), as cases that did not involve strong public interests in the requested information.

[10]This Court denied certiorari review on the issue of the waiver of these exemptions.

In keeping with the philosophy of broad disclosure, the government bears the burden under FOIA of justifying any decisions to withhold requested information. 5 U.S.C. § 552(a)(4)(B).

FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), the statutory provision at issue, protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The use of the words "clearly unwarranted" was a "considered and significant determination." *Dep't of Air Force v. Rose*, 425 U.S. 352, 378 n.16, 48 L.Ed.2d 11, 96 S.Ct. 1952 (1976). These words "tilt the balance" of privacy and public interest factors under Exemption 6 "in favor of disclosure." *Washington Post Co. v. U.S. Dep't of Health and Human Services*,, 690 F.2d 252, 261 (D.C. Cir. 1982). (Citation omitted). Thus, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act" (*id.*) and "Exemption 6 [is] directed at threats to privacy interests more palpable than mere possibilities" (*Rose*, *supra*, 425 U.S. at 380 n.19).

Exemption 6 balancing first requires an inquiry into whether a substantial invasion of personal privacy is implicated by a FOIA request, and then only if such an invasion is implicated, the next step is to evaluate the public interests that may be served by disclosure of the requested information. "If no significant privacy interest is implicated," the inquiry ends and "FOIA demands disclosure." *National Ass'n of Retired Federal Employees v. Horner ["NARFE"]*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1805 (1990), *citing Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 106 L.Ed. 2d 112, 109 S.Ct. 2841, 2850-53 (1989).

The District Court's decision, affirmed by the Eleventh Circuit, properly found that any privacy concerns of the returnees were outweighed by the great public interests in disclosure of the returnees' identities. The only evidence presented by the State Department on the issue of privacy is a

conclusory declaration which states that disclosure of the returnees' names would "subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43. (Emphasis added). Otherwise, the State Department claims that the returnees' names should not be disclosed because of alleged promises of confidentiality. The evidentiary record does not support these alleged promises, as not one of the 40 pages of interview reports refers to such promises. State Department Lodging 1-40. Furthermore, "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co., supra*, 690 F.2d at 263. Not surprisingly, the courts frequently order disclosure resulting in personal identification in a variety of circumstances when the privacy interests under Exemption 6 are outweighed by the public interests in the information requested. *See, e.g., Cochran v. United States*, 770 F.2d 949, 956 n.9 (11th Cir. 1985); *Arieff v. Dep't of Navy*, 712 F.2d 1462 (D.C. Cir. 1983) (Scalia, J.); *Kurzon v. Dep't of Health & Human Services*, 649 F.2d 65 (1st Cir. 1981).

On the other side of the Exemption 6 balancing equation, the District Court and the Eleventh Circuit found on the uncontroverted facts the following substantial public interests supporting disclosure of the returnees' names: (a) the ability to guarantee the safe relocation of Haitians, (b) the opportunity to question whether the United States is monitoring properly Haiti's compliance with its obligations not to persecute returnees, and (c) a mechanism to determine whether United States officials were accurate in stating that the returnees have not been persecuted. 725 F.Supp. at 505; 908 F.2d at 1555. There also is a public interest in fair and consistent political asylum proceedings in the United States. The Eleventh Circuit noted that even the State Department admitted the "legitimate public interest in the safe relocation of Haitians." 908 F.2d at 1555. All of these public interests are heightened by the fact that the State Department admits that Haiti has "a lengthy history of political repression" (Pet.Br. 3) in that "Haiti suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier

dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2), and by the fact that the record shows evidence of persecution in Haiti (J.A. 28, 29, 36 and 69).

With the law and the facts plainly against it, the State Department's entire case boils down to its "derivative use" argument. The State Department argues that information never can be disclosed under Exemption 6 when the "derivative use" for the information is "to check the accuracy of the government's records at their source." Pet.Br. 21. The State Department's argument inappropriately asks the Court completely to abandon traditional Exemption 6 balancing as intended by Congress and as enforced by this and other courts. Yet, the State Department fails to provide a plausible explanation as to *why* this Court should turn FOIA on its head by abandoning traditional Exemption 6 balancing. This failure is highlighted by the fact that the congressionally mandated balancing approach fully takes into account all interests, even in the "derivative use" scenario. If significant privacy interests outweigh public disclosure interests in the "derivative use" context under traditional Exemption 6 balancing, withholding is proper. If, on the other hand, in the atypical case, as this Court recognized in *United States Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 773, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989), information concerning individuals "sheds light" on government conduct, disclosure may be appropriate under traditional Exemption 6 balancing. In this case, the identities of the returnees will help shed light on the conduct of the government with respect to the interdiction program and persecution in Haiti. The alleged privacy interests of the returnees are far outweighed by the significant public interests in disclosure.

The judgment of the District Court, affirmed by the Eleventh Circuit, was not clearly erroneous. The judgment of the Eleventh Circuit, therefore, should be affirmed.

ARGUMENT

I. The Purpose Of FOIA

This Court on numerous occasions has enunciated the basic philosophy of broad disclosure under FOIA, as summarized in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 107 L.Ed.2d 462, 471, 110 S.Ct. 471, (1989), *reh. denied,* 110 S.Ct. 884 (1990):

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling hands." The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." (Citations omitted).[11]

In keeping with the philosophy of broad disclosure, the agencies bear the burden of justifying their decisions to withhold requested information. 5 U.S.C. § 552(a)(4)(B). Indeed, the pertinent Senate Report reads:

> Placing the burden of proof upon the agency puts the task of justifying withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action. S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) ("S.Rep. No. 813").[12]

The State Department, citing S. Rep. No. 813, attempts to rewrite FOIA and reduce the scope of access to information by arguing that "the central purpose of FOIA is to provide the fullest *responsible* disclosure of government documents." Pet.Br. 12, 14. (Emphasis added). That Senate Report, however, plainly emphasizes that "*[i]t is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure* unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled." S. Rep. No. 813 at 3. (Emphasis added).[13] Only the last sentence in this section of the bill references the word "responsible" -- the word seized on by the State Department. Thus, the State Department's emphasis on "responsible" - rather than "fullest" - disclosure distorts the true intention of Congress as evidenced by the folowing quote from the Senate Report's "Purpose of Bill" quoting from James Madison:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves

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[11] *See also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 106 L.Ed.2d 112, 123-124, 109 S.Ct. 2841 (1989); *Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 754-55, 103 L.Ed.2d 774, 784, 109 S.Ct. 1468 (1989); *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-362, 48 L.Ed.2d 11, 96 S.Ct. 1592 (1976); *EPA v. Mink*, 410 U.S. 73, 79-80, 35 L.Ed.2d 119, 93 S.Ct. 827 (1973).

[12] *See also John Doe Agency, supra*, 493 U.S. 146, 107 L.Ed.2d at 471 ("There are, to be sure, specific exemptions from disclosure set forth in the Act. 'But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of The Act.' Accordingly, these exemptions 'must be narrowly construed.' Furthermore, 'the burden is on the agency to sustain its action'") (citations omitted); *Exxon Corp. v. FTC*, 663 F.2d 120, 127 (D.C. Cir. 1980) ("In Freedom of Information Act cases, . . . the agency claiming an exemption from the duty to disclose information has the burden of proof and the district court should apply that burden with the knowledge that the plaintiff is at a distinctive disadvantage in attempting to test the claims alleged by the agency").

[13] *See also Arieff, supra,* 712 F.2d at 1468 (J. Scalia) ("Providing information 'material for monitoring the Government's activities' is the 'core purpose' of the FOIA").

with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. S.Rep. No. 813 at 2-3.

II. The Government's Heavy Burden Under Exemption 6

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). At the House and Senate committee hearings on the bill,[14] representatives of various government agencies urged that the words "clearly unwarranted," or at least the word "clearly", be deleted from the bill so that all invasions of privacy could be prevented.[15] The government objected to its "heavy burden" under the clearly unwarranted invasion of personal privacy standard. *Rose*, *supra*, 425 U.S. at 378 n.16. Congress, however, refused to delete this language it considered critical in limiting the scope of Exemption 6. S. Rep. No. 813 at 9; H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966) ("H.R. Rep. No. 1497"). By retaining the words despite these repeated agency requests, Congress rejected an opportunity to guarantee blanket protection for all potential privacy invasions. The use of words "clearly unwarranted", therefore, was "a considered and significant determination." *Rose*, *supra*, 425 U.S. at 378 n. 16.[16]

The mandate of Exemption 6 that disclosure be "clearly unwarranted" instructs the courts to "tilt the balance" of privacy and disclosure interests "in favor of disclosure." *Washington Post Co. v. U.S. Dep't of Health & Human Services*, 690 F.2d 252, 261, (D.C. Cir. 1982). (Citation omitted).[17] Thus, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in The Act." *Id.*[18] Not surprisingly then, "[t]he legislative history is clear that Exemption 6 [is] directed at threats to privacy interests more palpable than mere possibilities" (*Rose*, *supra*, 425 U.S. at 380 n.19), and "Exemption 6 does not protect against disclosure every incidental invasion of privacy" (*id.* at 382).

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[14] *See, e.g.*, Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before a Subcommittee of the House Committee on Govt. Operations, 89th Cong., 1st Sess. (1965); Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965); Hearings on S. 1666 and S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963).

[15] *See, e.g.*, testimony of Edwin Rains, Assistant General Counsel, Treasury Department, in Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 36 (1965) ("1965 Senate Hearings"); testimony of Fred. B. Smith, Acting General Counsel, Treasury Department, in Hearings Before a Subcommittee of the Committee on Government Operations of the House of Representatives on H.R. 5012, 89th Cong., 1st Sess. 56 (1965) ("1965 House Hearings"); testimony of Clark R. Mollenhoff, Vice Chairman, Sigma Delta Chi Committee for Advancement of Freedom of Information, 1965 House Hearings at 151; testimony of William Feldesman, NLRB Solicitor, 1965 Senate Hearings at 491 & 1965 House Hearings at 257.

[16] The State Department focuses on the following language in H.R. Rep. No. 1497 at 11: "The exemption is also intended to cover detailed government records on an individual . . . ." However, this section of the House Report simply addresses which records constitute "personnel and medical files and similar files" which are *eligible* for, not entitled to, Exemption 6 consideration.

[17] *See also Ditlow v. Schultz*, 517 F.2d 166, 169 (D.C. Cir. 1975); *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971); *Southern Utah Wilderness Alliance, Inc. v. Hodel*, 680 F.Supp. 37, 39 (D.D.C. 1988); *Citizens for Environmental Quality v. Dep't of Agriculture*, 602 F.Supp. 534, 538 (D.D.C. 1984).

[18] *See also Kurzon v. Dep't of Health & Human Services*, 649 F.2d 65, 67 (1st Cir. 1981) ("By restricting the reach of exemption 6 to cases where the invasion of privacy caused by disclosure is not only unwarranted but *clearly* so, Congress has erected an imposing barrier to nondisclosure under this exemption"; withholding is a "rare case" when "the calculus unequivocally supports withholding . . . because Congress has weighted the balance so heavily in favor of disclosure").

That the policy of disclosure is stronger under Exemption 6 than anywhere else in FOIA also is confirmed by this Court in comparing Exemption 6 to Exemption 7(C) in *Reporters Committee*, *supra*, 489 U.S. at 756:

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President. Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment. Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files. (Footnotes omitted).[19]

[19] *See also FBI v. Abramson*, 456 U.S. 615, 629 n.13, 72 L.Ed.2d 376, 102 S.Ct. 2054 (1982) ("The distinction [between Exemptions 6 and 7] is meaningful"); *Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. 1989); *Fund for Const. Gov't v. Nat'l Archives*, 656 F.2d 856, 862 (D.C. Cir. 1981); *Powell v. Dep't of Justice*, 584 F.Supp. 1508, 1528 (N.D. Cal. 1984) ("Exemption 6 is a more narrow exemption"); *Congressional News Syndicate v. Dep't of Justice*, 438 F.Supp. 538, 541 (D.D.C. 1977) ("The difference in breadth [between Exemptions 6 and 7] is attributable to the inherent distinction between investigatory files and personnel, medical and similar files: that an individual's name appears in files of the latter kind, without more, will probably not engender comment and speculation, while, as the Government argues here, an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo").

III. The Balancing Of Privacy And Public Interests Favors Disclosure In This Case

Because the core philosophy of FOIA is that of disclosure, Exemption 6 balancing first requires an inquiry into whether a substantial invasion of personal privacy is implicated by a FOIA request, and then only if such an invasion is implicated, the next step is to evaluate the public interests that may be served by disclosure of the requested information. *NARFE*, *supra*, 879 F.2d at 874. "If no significant privacy interest is implicated", the inquiry ends and "FOIA demands disclosure." *Id.*, *citing Tax Analysts*, *supra*, 492 U.S. 136, 109 S.Ct. at 2850-53.[20]

The State Department again attempts to rewrite FOIA by asking the Court first to address public disclosure interests, and then if necessary, to look to privacy interests. The State Department argues that because there is no public interest in the returnees' names in this case, an inquiry into the alleged privacy invasions "should be unnecessary." Pet.Br. 27. The State Department by this formulation asks this Court to avoid the statute, the legislative history and the precedent of this Court, all of which make plain that disclosure is the rule under FOIA (especially when Exemption 6 is implicated), and that it is the agency's burden to justify withholding. If the State Department does not like the Freedom of Information Act as Congress drafted it, the Department may ask Congress to amend the statute. The State Department must abide by its burden under the law, and to the extent the agency cannot show a substantial invasion of personal privacy, FOIA demands disclosure.

[20] *See also Halloran*, *supra*, 874 F.2d at 319; *Washington Post*, *supra*, 690 F.2d at 261; *Campbell v. U.S. Civil Service Commission*, 539 F.2d 58, 61 (10th Cir. 1976); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3rd Cir. 1974); *Rural Housing Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 77, *motion denied*, 511 F.2d 1347 (D.C. Cir. 1974).

A. The State Department Fails To Meet Its Burden In Showing A Clearly Unwarranted Invasion Of Personal Privacy

The State Department fails to meet its privacy burden in several critical respects. First, the agency raises only possibilities with respect to invasions of privacy. Second, the declarations relied on by the agency are conclusory and insufficient as a matter of fact and law. Third, the agency cannot overcome the weight of the law that requires disclosure on the facts of this case. Finally, the agency's confidentiality arguments are unfounded.

1. The Agency Raises Only Mere Possibilities

Exemption 6 is "directed at threats to privacy interests more palpable than mere possibilities." *Rose*, *supra*, 425 U.S. at 380 n.19.[21] Several courts have suggested that the threshold production of documents alone must constitute the clearly unwarranted invasion of personal privacy under Exemption 6. *See*, *e.g.*, *Arieff*, *supra*, 712 F.2d at 1468 ("According to the statute, it is the very 'production' of the documents which must 'constitute a clearly unwarranted invasion of personal privacy'") (Scalia, J.); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F.Supp 454, 457-58 (D.D.C. 1977).[22]

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[21] *See also NARFE*, *supra*, 879 F.2d at 877; *Arieff v. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983) (J. Scalia); *Citizens*, *supra*, 602 F.Supp. at 538; *Nat'l Ass'n of Atomic Vet. v. Dir. Defense Nuc. Agency*, 583 F.Supp. 1483, 1487 (D.D.C. 1984).

[22] The State Department argues that one must look to derivative invasions of privacy: "The purpose for which respondents seek this information adds further to the assault upon the privacy values protected by the Act. Respondents seek these names and addresses so that they can go to Haiti, track down the interviewed Haitian citizens and 'check what happened'. . . ." Pet.Br. 30. Ironically, one of the State Department's principal arguments urging reversal is that the derivative use for information should *not* be considered on the public interest side of the balance.

Here, the mere disclosure of the names of the returnees will not cause a clearly unwarranted invasion of personal privacy. Moreover, even with respect to any possible derivative or secondary invasions of privacy, the State Department only raises unfounded "possibilities." If the returnees truly have not been persecuted, as United States officials have proclaimed publicly, the returnees will not be effected by being asked for such benign confirmation. Even more importantly, the returnees will be free not to respond to any inquiries regarding their circumstances in Haiti.

Thus, the best the State Department can do is argue that the revelation of the returnees' names may cause the perception of "cooperation with United States officials by foreigners [which] is not always greeted with indifference by the foreigner's government or countrymen." Pet.Br. 29. However, the State Department only can point to circumstances in *Iran* as described in a different case. *Ibid.* The true facts in this case indicate that the Miami INS District Director was so convinced that privacy interests did not exist that he was quoted as offering "to provide names of [the] Haitians who have been sent back so that doubters can go to Haiti and speak to the people directly." J.A.28.[23]

The State Department otherwise states that the interview reports on the returnees contain personal information such as marital status, employment history, and living conditions.[24] The agency maintains that "[d]isclosure of such information quite plainly constitutes a 'clearly unwarranted' invasion of privacy

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[23] The government's attorney also indicated that the possibility for violation of privacy interests was remote because of her belief that "[t]he chances of being able to track down these individuals and find out whether their statements are accurate seem unlikely . . . [because] since that time the Government of Haiti has been in a great deal of flux." J.A. 66.

[24] Many of the interview reports are not as detailed as the State Department suggests and they do not contain much personal information regarding the interviewees. *See*, *e.g.*, the State Department's Lodging at 35-37 summarily and collectively referring to interviews of 33 Haitians.

under this Court's cases." Pet.Br. 30. The State Department fails to understand that this information already has been disclosed, and the agency avoids explaining factually how the revelation of the returnees' names would create a clearly unwarranted invasion of personal privacy. What remains of the State Department's privacy argument then is the agency's misplaced reliance on conclusory declarations, distinguishable cases, and unfounded arguments concerning alleged promises of confidentiality.

2. The State Department's Conclusory Declarations Are Insufficient

The State Department's entire showing on the issue of invasion of privacy boils down to Mr. Eaves' speculative statement that the disclosure of the returnees' identities would "subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43. (Emphasis added).[25] Mr. Eaves does not provide any supporting factual detail describing the likelihood and the actual type of social and community embarrassment to be suffered by these individuals. Indeed, *not a single returnee professed a concern about social and community embarrassment as reflected in the interview reports*. State Department Lodging 1-40.

Accordingly, the State Department's privacy showing, which is based on the Eaves declaration, is factually deficient as a matter of law. *See King v. Dep't of Justice*, 830 F.2d 210, 218-19 (D.C. Cir 1987) (Declarations are insufficient if they are "'conclusory, merely reciting statutory standards, or if they are too vague or sweeping'"); *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (The Courts will not "accept glib government assertions" and supporting declarations "must be 'relatively detailed' and nonconclusory"); *Campbell v. Dep't of HHS*, 682 F.2d 256, 265-66 (D.C. Cir. 1982) (The government "does not meet its burden

[25]The declarations of Messrs. Melton and Byrd do not attempt to describe alleged invasions of the returnees' privacy. Rather, these declarations attempt to support waived Exemptions 1 and 7. (J.A. 53-64).

. . . through conclusory statements, unaccompanied by supporting detail that these exceptions are applicable"); *Church of Scientology of California v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979); *Citizens*, *supra*, 602 F.Supp at 539; *Powell*, *supra*, 584 F.Supp. at 1512.

3. The Act, The Legislative History And The Cases Provide For Name Disclosure In Appropriate Circumstances

The State Department cites several cases (Pet.Br. 28)[26] in which courts have withheld names from disclosure under Exemption 6, and then the agency states that "[i]n no FOIA case of which we are aware has such personal information [names and/or identifying details] been ordered disclosed" (Pet.Br. 30).[27] The State Department creates the impression that names always have been and always should be withheld from disclosure under Exemption 6.

The reality, however, is that the legislative history to Exemption 6 and the long line of cases under this exemption support name disclosure in appropriate circumstances. The principal sponsor of the 1974 amendments to FOIA stated that "deletion of names and identifying characteristics of individuals would in *some cases* serve the underlying purpose of Exemption 6." *Rose*, *supra*, 425 U.S. at 375, *quoting* 120 Cong. Rec. 17,018 (1974). (Emphasis added). Furthermore, the Senate Report provides that the balance to be drawn under Exemption 6 is one between "the protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the

[26]These cases are distinguishable because the privacy interests were not outweighed by public disclosure interests.

[27]The notion that the State Department has provided information on some of the returnees with respect to marital status, employment status, and living conditions does nothing to satisfy the public interests favoring disclosure of the returnees' names, as discussed in ARGUMENT Section III. B.

public's right to governmental information." *Rose*, *supra*, 425 U.S. at 380 n.19, *quoting* S. Rep. No. 813 at 9. (Emphasis supplied by this Court). Thus, identifying information is to be disclosed under Exemption 6 in certain cases in which privacy interests are less significant than the necessity for public scrutiny.

Not surprisingly, the courts frequently order disclosure of names in a variety of circumstances when the privacy interests under Exemption 6 are outweighed by the public interests in the information requested. *See Cochran v. United States*, 770 F.2d 949, 956 n.9 (11th Cir. 1985) (Disclosure of identifying details and disciplinary information on military officer accused of alleged improprieties); *Arieff*, *supra*, 712 F.2d 1462 (Disclosure of information possibly identifying individuals as taking particular drugs for particular diseases) (Scalia, J.); *Kurzon*, *supra*, 649 F.2d 65 (Disclosure of names and addresses of unsuccessful applicants for research grants from the National Cancer Institute); *Columbia Packing Co., Inc. v. U.S. Dep't of Agriculture*, 563 F.2d 495 (1st Cir. 1977) (Disclosure of personnel records of two former federal meat inspectors who were convicted of taking bribes); *Ditlow*, *supra*, 517 F.2d 166, 170 (Disclosure of names and addresses contained in customs declaration forms "would result in less than a substantial invasion of privacy"); *Painting Indus. of Hawaii Mkt. Recovery Fund v. Dept of Air Force*, 756 F.Supp 452 (D. Hawaii 1990) (Disclosure of names, addresses, phone numbers and social security numbers of employees referred to in payroll records); *Nat'l Ass'n of Atomic Vet.*, *supra*, 583 F.Supp 1483 (Disclosure of names and addresses of present and former military service members who participated in an atmospheric nuclear weapons testing program); *Norwood v. FAA*, 580 F.Supp. 994 (W.D. Tenn. 1983) (Disclosure of the identities of former air traffic controllers who had been terminated); *Nat'l Western Life Ins. Co. v. United States*, 512 F.Supp. 454 (N.D. Tex. 1980) (Disclosure of the names and duty stations of employees of the United States Postal Service employed in two cities); *Disabled Officer's Ass'n*, *supra*, 428 F. Supp. 454 (Disclosure of names and addresses of retired disabled military flight officers); *Philadelphia Newspapers Inc. v. Dep't of Justice*, 405 F.Supp. 8 (E.D. Pa. 1975) (Disclosure of the names of

persons who wrote letters recommending parole for a particular prisoner).[28]

Respondents by this brief do not argue that names and addresses always, or even in the majority of cases, should be disclosed under Exemption 6. Rather, the names and addresses of the returnees should be disclosed in this case, and in other appropriate circumstances, when such information will help shed light on the conduct of the government.[29]

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[28] *See also* the following cases providing for name disclosure in the labor context: *I.B.E.W. Local v. No. 5 v. HUD*, 852 F.2d 87 (3rd Cir. 1988) (Disclosure of payroll records including employees' names, addresses, and social security numbers); *Dep't of Navy v. FLRA*, 840 F.2d 1131 (3rd Cir.) (Disclosure of names and addresses of bargaining unit members), *cert. dismissed*, 488 U.S. 881 (1988); *Dep't of Air Force v. FLRA*, 838 F.2d 229 (7th Cir.) (Disclosure of home addresses of employees to union), *cert. dismissed*, 488 U.S. 880 (1988); *U.S. Dep't of HHS v. FLRA*, 833 F.2d 1129 (4th Cir. 1987) (Disclosure of names and addresses of bargaining unit employees), *cert. dismissed*, 488 U.S. 880 (1988); *Amer. Fed. of Gov. Emp., Local 1760 v. FLRA*, 786 F.2d 554 (2nd Cir. 1986) (Disclosure of employee addresses to union); *I.B.E.W. of Elec. Workers v. HUD*, 763 F.2d 435 (D.C. Cir. 1985) (Disclosure of names of employees listed on payrolls); *Getman*, *supra* 450 F.2d 670 (Disclosure of names and addresses of employees eligible to vote in certain elections).

See also the following cases providing for identity disclosure under Exemption 7: *Common Cause v. Nat'l Archives & Rec. Serv.*, 628 F.2d 179 (D.C. Cir. 1980) (Remand to consider disclosure of identities of candidates for federal office to whom certain corporations admitted making or were alleged to have made unlawful campaign contributions); *Congressional News Syndicate*, *supra*, 438 F.Supp. 538 (A news syndicate was entitled to production of records as to contributors and recipients of a fund for the "Townhouse Operation" despite the contention that opprobrium would attach to anyone whose name was linked with a Watergate investigation).

[29] *Cf. Reporters Committee*, *supra*, 489 U.S. at 773 ("In this case - and presumably in the typical case in which one private citizen is seeking information about another - the requestor does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official").

4. The State Department's Confidentiality Arguments Are Unfounded

The State Department "does not contend that the mere fact that the government obtained the information under a pledge of confidentiality invariably controls the question of disclosure under Exemption 6." Pet.Br. 31.[30] The agency obviously understands that supposed promises of confidentiality cannot be determinative, because otherwise agencies easily could override the statute and avoid the disclosure requirements of FOIA simply by promising confidentiality whenever the government wants to withhold information. Indeed, "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co., supra*, 690 F.2d at 263.[31] The government, in fact, has admitted in a reverse-FOIA case that even though "there was a general understanding that [certain] information . . . would be held in confidence . . . such a promise is without legal effect." *Sonderegger v. Dep't of Interior*, 424 F.Supp. 847, 853 (D. Id. 1976).

The State Department nevertheless argues that "the circumstances under which the interviews were conducted in this case provide a highly reasonable context for the government to have offered confidentiality" because of national defense or foreign policy concerns under Exemption 1. Pet.Br. 32. This argument fails for several reasons. First, it is undisputed that Exemption 1 was waived, and therefore this exemption is not before the Court. Second, as the Eleventh Circuit stated, "it [is] difficult to believe that the redacted information implicates

[30]Interestingly, the "information" at issue, the names and addresses of the returnees, already was in the possession of the State Department prior to the interviews. Pet.Br. 4. Accordingly, it cannot be said that this information was obtained "under a pledge of confidentiality."

[31]*See also Ackerly v. Ley*, 420 F.2d 1336, 1340 n.3 (D.C. Cir. 1969) (Promises of confidentiality "cannot, in and of themselves, override the Act"); *Robles, supra*, 484 F.2d at 846 ("[W]hile, perhaps, a promise of confidentiality is a factor to be considered, it is not enough to defeat the right of disclosure").

compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs." 908 F.2d at 1557. (Emphasis in original). Third, the State Department's national defense/foreign policy argument is inappropriate, as it has no bearing on the traditional inquiry into any invasion of the returnees' privacy under Exemption 6. *See Washington Post Co., supra*, 690 F.2d at 260 n.23 ("Exemption 6 is concerned with protecting personal privacy, and no more"); *Board of Trade of Chicago v. Commodity Futures Trad. Comm'n*, 627 F.2d 392, 400 (D.C. Cir. 1980).[32]

The State Department's confidentiality argument also fails as a matter of fact. The only support in the record for the alleged promises of confidentiality are (a) Mr. Eaves' conclusory statement that "those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality" (J.A. 42-43), and (b) Mr. Melton's summary statement that the interviews were conducted "on the understanding that [the returnees'] identities would be kept confidential" (J.A. 54).[33]

This slim evidentiary showing should have no effect on the Exemption 6 balancing in this case, especially in light of the fact that *nowhere in the 40 pages of interview reports*, which were drafted close in time to the interviews and which summarized the interviews, *is there even one reference to a promise of*

[32]One must wonder whether it was proper as a matter of law for the State Department affirmatively to take advantage of the alleged promises of confidentiality, as such promises deny political asylum applicants the opportunity to "inspect, examine, and rebut" the BHRHA advisory opinions under Title 8 C.F.R. § 208.10(b). *See also* 8 U.S.C. § 1252(b).

[33]These alleged promises are similar to those alleged in *Sonderegger, supra*, 424 F.Supp. at 853, wherein the government admitted that the promises were "without legal effect."

confidentiality. State Department Lodging 1-40.[34] The State Department has failed its duty as recognized by the courts to present facts showing that: (1) promises of confidentiality were given even if not requested by the returnees, (2) promises of confidentiality were made to all of the returnees interviewed, and (3) the identities of the returnees have been held in strict confidence. *See, e.g., Robles, supra*, 484 F.2d at 846.

B. Significant Public Interests Support Disclosure

Because the State Department has failed to meet its burden of showing a substantial invasion of personal privacy, FOIA mandates disclosure of the returnees' names. This is particularly true because significant public interests support disclosure. The State Department counters with a "derivative use" argument, but this argument is fundamentally flawed.

1. Provision Of The Names Will Help Shed Light On The Government's Activities and Statements Related To The Interdiction Program and Persecution In Haiti

The law is plain that the public has an interest in determining whether the government is conducting its duties properly and whether the government is disseminating accurate information to the public. For example in *Citizens, supra*, 602 F.Supp. at 537, the court ruled that "the public has an interest in learning that [the government] is not abiding by its alleged commitment to effectively monitor the health effects of herbicide spraying." Furthermore, in *Nat'l Ass'n of Atomic Vet., supra*, 583 F.Supp. at 1487, the court held that the public had an interest in assessing the effectiveness of the government's dissemination of information to veterans relating to a government study on the adverse health effects of exposure to atomic radiation. The

[34]The reports indicate the possibility that the alleged promises were not made. *See, e.g.*, State Department Lodging 12, 15, 17 and 19 (reporting that interviewees "approached" the interviewers and were "eager" and "pleased" to speak to them).

court ruled that disclosure properly would enable the requester to conduct its own studies which "may shed light on the validity of the methodology used and the conclusions reached by the government in its study." *Id.*

The State Department nevertheless argues that the names of the returnees in this case are "irrelevant" to "an understanding of the manner in which the government was supervising and administering the interdiction program." Pet.Br. 20. Yet, the uncontroverted findings of the Courts below demonstrate significant public interests supporting disclosure of the returnees' names. The District Court and the Eleventh Circuit found that the names: (a) will help to guarantee the safe relocation of the returnees, (b) will afford the opportunity to ascertain whether the United States is monitoring properly Haiti's compliance with its obligations not to persecute returnees, and (c) will provide a mechanism to determine whether United States officials have been accurate in stating that the returnees have not been persecuted. 725 F.Supp. at 505; 908 F.2d at 1555.[35]

The public interest in assessing the State Department's conduct and the accuracy of its statements with respect to the interdiction program and persecution in Haiti is heightened by the fact that the agency admits that Haiti has "a lengthy history of political repression" (Pet.Br. 3) in that "Haiti suffered for 29 years under the notorious 'Papa Doc' and 'Baby Doc' Duvalier dictatorships, followed by five years of military rule" (Pet.Br. 3 n.2), and by the fact that the record shows evidence of persecution in Haiti (J.A. 28, 29, 36 and 69).

Moreover, to obtain disclosure, Respondents need not show that the State Department has been guilty of misconduct or has made false statements. The public, rather, is entitled to an inquiry by which it can decide for itself whether agency action has been proper. Disclosure is appropriate even if in the final analysis it becomes apparent that all government actions and

[35]There also is a public interest in "fair and consistent" political asylum proceedings in this country. *Cf. Norwood, supra*, 580 F.Supp. at 999.

statements were proper. *See IBEW Local v. No. 5, supra*, 852 F.2d at 92; *Citizens, supra*, 602 F.Supp. at 540.[36] Accordingly, in appropriate circumstances courts permit disclosure of names and addresses of persons who have knowledge pertaining to governmental activities. *See* ARGUMENT Section III.A.3. and the cases cites therein.

2. The State Department's "Derivative Use" Argument Improperly Asks The Court to Abandon Traditional Exemption 6 Balancing Mandated By The Act, The Legislative History, And The Precedent Of This Court

The State Department argues that information never can be disclosed under Exemption 6 when the "derivative use" for the information is "to check the accuracy of the government's records at their source." Pet.Br. 21. The State Department's argument represents an inappropriate invitation completely to abandon traditional Exemption 6 balancing as intended by Congress and as enforced by this and other courts.

The State Department first argues that the courts cannot look to the "derivative use" for information because to do so would entitle each requestor to omnibus access to all information; "[a]ll . . . a requestor would be required to do is frame his request in terms of a desire to contact the individuals involved and interview them as part of an investigation into the accuracy of the government's records and the fairness or effectiveness of the administration of those governmental programs." Pet.Br. 22.

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[36]The court in *Washington Post Co., supra*, 690 F.2d at 264, stated: "[T]he purpose of FOIA is to permit the public to decide *for itself* whether government action is proper. Congress was all too aware of the '[i]nnumerable times' that agencies had withheld information under prior law 'only to cover up embarrassing mistakes or irregularities.' S. Rep. at 3. FOIA was designed to prevent such incidents and establish instead '[t]he right of the individual to be able to find out how his government is operating.' H.R. Rep., *supra*, note 23, at 6, 1966 U.S. Code Cong. & Ad. News at 2423. In light of that purpose, the public interest in disclosure is not diminished by the possibility or even the probability that [the government] is doing its . . . job right." (Emphasis in original and footnotes omitted).

The State Department's premise that a "derivative use" request necessarily opens the floodgates of disclosure is false. Under traditional Exemption 6 balancing, the courts are required first to analyze privacy interests and then weigh any such interests against public interests in disclosure. If significant privacy interests outweigh public disclosure interests in the "derivative use" context, withholding is proper.[37] The State Department provides no plausible explanation as to why this Court should turn FOIA on its head by abandoning traditional Exemption 6 balancing, especially when this congressionally mandated approach fully takes into account all interests, even in the "derivative use" scenario.[38]

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[37]In this case, privacy interests are speculative and public interests are paramount. The State Department only raises "possible embarassment" in terms of alleged privacy invasions. The public, on the other hand, has interests in the safe relocation of the returnees, the opportunity to ascertain whether the United States is monitoring properly Haiti's obligation not to persecute returnees, a mechanism to determine whether the United States has been truthful about persecution of the returnees, and fair and consistent political asylum proceedings. In other cases, like this one, in which requesters seek the identities of persons they can contact to monitor government activities and statements, and in which privacy interests are outweighed by disclosure interests, courts properly have ordered disclosure. *See, e.g., Nat'l Ass'n of Atomic Vet., supra*, 583 F.Supp. 1483 (Disclosure of names and addresses of present and former military service members who participated in an atmospheric nuclear weapons testing program because of the public interest in monitoring the government's dissemination of information and methodology used with respect to medical studies related to the nuclear weapons testing); *Citizens, supra*, 602 F.Supp. 534 (Disclosure of the results of medical tests and data pertaining to the health effects of herbicide spraying because of the significant public interest in ascertaining whether the government effectively was monitoring the health effects of spraying, even though disclosure could lead to linking personal medical tests to particular individuals).

[38]The State Department cites *Hopkins v. HUD*, No. 90-9269 (2nd Cir. April 1, 1991), as a case which "rejected the proposed 'derivative use' theory precisely because it would swallow entirely the privacy protections afforded by Exemption 6." Pet.Br. 22. In *Hopkins*, however, the court employed traditional Exemption 6 balancing in a "derivative use" case and found based on the facts of that case that privacy interests outweighed disclosure interests because of the "attenuated relationship" between the information sought and "governmental activity". The Court did not hold, as the State Department suggests, that derivative public use for information cannot be considered in traditional

The State Department next argues that the "derivative use" for information cannot be considered under Exemption 6 because such an analysis "is flatly inconsistent with the holding in *Reporters Committee*." Pet.Br. 23.[39] The fallacy of the State Department's argument is revealed by the very language of this Court in *Reporters Committee*:

> [The] basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on the agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct. In this case - and presumably in the typical case in which one private citizen is seeking information about another -

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Exemption 6 balancing.

[39]The State Department cites several other cases, all of which are distinguishable.

The State Department places some reliance on the holding in *Rose, supra*, 425 U.S. 352. However, the requesters in *Rose* asked that identifying information be deleted from the documents requested because in that case there was not a great public interest that would emanate from disclosure of the identities of the cadets.

Kissinger v. Reporters Committee, 445 U.S. 136, 150-154, 63 L.Ed.2d 267, 100 S.Ct. 960 (1980), simply stands for the proposition that FOIA does not entitle a requester to records that are not in the possession of the requested agency. Here, it is undisputed that the unedited interview reports are in the possession of the State Department.

Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991), simply involved the withholding of information pertaining to an SEC investigation under Exemption § 5 and 7(C).

Reed v. NLRB, No. 90-5147 (D.C. Cir. March 15, 1991), addressed the narrow issue of Excelsior lists.

> requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official. 489 U.S. at 773. (Citation omitted).

This Court in *Reporters Committee* afforded the opportunity in the atypical case for disclosure of information concerning individuals under traditional Exemption 6 balancing when that information "sheds light" on government conduct. In this less than typical case, there are significant public interests in learning the identities of the returnees so that the public can shed light on the conduct of the government with respect to the interdiction program and persecution in Haiti.

The State Department next seems to argue that the Court may not look to the specific need of Respondents for the unedited interview reports. Respondents do not dispute that the Court should focus on the greater public interest in disclosure, rather than looking exclusively to Respondents' interests in the information requested. The public certainly has an interest in knowing how the government fulfills its promises to provide fair asylum hearings, prevent persecution, and knowing whether the government tells the public the truth about these matters. Respondents are part of the public and their use for the information should be included with the framework of the public interest. *See Amer. Fed. of Gov't Emp., Local 1760, supra*, 786 F.2d 554; *Arieff, supra*, 712 F.2d at 1468 (Scalia, J.); *Ditlow, supra*, 517 F.2d at 172 n.21. Not surprisingly, even the State Department at times looks to the "purpose for which Respondents seek this information." Pet.Br. 30. *See also* J.A. 66 (referring to Respondents' "purpose").[40]

The State Department falls back and argues that "[a]n approach that turns upon a proposed use for the government

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[40]It is interesting to note that then D.C. Circuit Judge Starr stated in his concurring opinion in *Reporters Committee* that the requesters' intended use for the requested information should be considered. 816 F.2d at 745.

records, rather than on the intrinsic informational value of the records, would introduce unworkable speculation and complexity into the application of Exemption 6." Pet.Br. 26. On this point Respondents simply note that the FOIA "requirement that the agency support its decision to withhold with reasonable authority places a duty on the agency to analyze the relevant law - to recognize distinguishing factors that make prior cases inapplicable to the case at hand, and to examine cases other than those that tend to support a decision to withhold." *Local 598 v. Dep't of Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th Cir. 1988). Either the State Department forgets that it has the highest burden under the statute in substantiating Exemption 6 withholding, or the agency improperly attempts to rewrite and lessen its statutorily mandated duties.

In sum, under traditional Exemption 6 balancing, the District Court, affirmed by the Eleventh Circuit, found that any alleged invasions of privacy were outweighed by the significant public interests in disclosure in this case. The State Department has not met its heavy burden under Exemption 6 to justify withholding, as the agency has failed to demonstrate that these findings and the decision to order disclosure of the returnees' names were clearly erroneous. This Court should affirm.

CONCLUSION

In accordance with the foregoing, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted.

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June 1991

APPENDIX

[Emblem] UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520
Office of Asylum Affairs
Bureau of Human Rights
and Humanitarian Affairs

April 1991

SITUATION IN HAITI

This office has no independent material about this specific applicant. Information on human rights practices in Haiti may be found in the State Department's current *Country Reports on Human Rights Practices*. The following additional material may be helpful in your review of this application for asylum.

The Haitian situation in recent years has been marked by extreme poverty, rapid political change (5 governments since 1986), and an upsurge in common crime. Many thousands of people have left Haiti seeking a better economic life and/or a more stable environment, but in our experience, very few have been able to demonstrate they departed out of a well-founded fear of persecution for political or other reasons covered by the Immigration and Nationality Act, as amended.

After the fall of Jean-Claude Duvalier in 1986, some adherents of the old regime left Haiti for the Dominican Republic, the U.S. and other countries. There have been instances of violence or intimidation by government and vigilante forces since 1986 against a few, small, extreme left organizations, as well as main-line groups. These and other acts of political violence have generally been sporadic and part of the general political turmoil of the times.

An unsettled atmosphere, common crime, and occasional political violence are of themselves usually insufficient to establish particular individuals' claims to asylum. Few people

have even sought to make other than a generalized claim.

Because of heavy popular pressure, Prosper Avril resigned as president on March 10, 1990, and Mrs. Ertha Pascal-Trouillot, a justice of the Supreme Court, was sworn in as president three days later. Under her leadership, a general election which international observers commended as free and fair was held on December 16, 1990. Father Jean-Bertrand Aristide won an overwhelming victory and on February 7, 1991 became Haiti's first president to be elected in democratic elections. He has been a longstanding opponent of the Duvaliers and despotic rule.

The phenomenon of "boat people" -- Haitians setting out in small boats to enter the U.S. -- generally describes persons seeking to improve their conditions economically. We have no reports of any "boat people" returned through the migrant interdiction program being persecuted thereafter.

The U.S. Embassy studied migrants in the 1983-85 period and interviewed a substantial number after they had returned to their home areas. No cases of persecution were uncovered.

HAITIAN MIGRANT INTERDICTION OPERATION[1]
OPERATION INSTRUCTIONS
(Revised March 1, 1988)

PART I - GENERAL BACKGROUND

The following directives are to be followed by INS employees assigned to U.S. Coast Guard cutters interdicting vessels at sea pursuant to Presidential Proclamation # 4685 and Executive Order #12324, dated September 29, 1981. The duties of INS employees assigned to the Coast Guard cutters is limited to matters related to the interview of persons on board with respect to documentation relating to the entry into the United States and possible evidence of refugee status. the over-all function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during the interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

PART II - WHILE ABOARD COAST GUARD VESSELS

At all times, the INS officer and Interpreter will be under the direction of the Commanding Officer (CO) and the Boarding Officer, with the exception of the process of making the required INS determinations.

The INS team will answer all boarding calls by reporting to the bridge. The interpreter will be prepared to assist with

[1] The following document, though not in the record in this case, has been repoduced from a certified copy which was introduced into evidence at trial in another Freedom of Information Act case, *Ray v. U.S. Dep't of Justice, INS*, Case No. 89-288-CIV-RYSKAMP (S.D. Fla. Trial Held Apr. 5 and 30, 1990). The original certified copy of this document (Plaintiff's Exhibit 7B and 7C) has been lodged with this Court.

communication with the vessel. When a suspect vessel has been identified and the CO of the Coast Guard cutter has decided to board the vessel, the team will then report to the Boarding Officer at the small boat station. A writing pad will be carried to record any information required for the boarding report.

The INS team will accompany the boarding officers upon the initial boarding and will assist with translating, reviewing documentation, and in interrogating. If the vessel is engaged in legitimate trade, and all documentation is in order, the INS team will assist the Boarding officer in gathering other information for preparation of the boarding report.

When undocumented migrants are located, the INS Officer will determine nationality, destination, and purpose of the trip. If it is determined that they are enroute to the United States, the Boarding Officer will inform them that they cannot legally continue to the United States and must be returned to their home country. The CO will then be informed that there are (number of male, female and children) to be returned to their country.

After the decision to repatriate, generally all the migrants are taken aboard the cutter. (If for some reason the migrants are repatriated on their own vessel, the INS team as well as the Boarding Officer will remain with them). The INS Officer will then assist the Operations Officer aboard the cutter with the SITREP (situation report) required at this time.

List of Migrants- After the initial SITREP is completed, the INS team will immediately interview each migrant separately. During the interviews, a list will be prepared, including the name, place of birth, date of birth and home address. The INS team will ask every individual why he is leaving his country, why he is going to the United States, and whether he/she has any fear of returning to his/her country.

Persecution Claims- If there is any indication that the individual does fear returning, the INS officer will expand his interview to include questions in detail concerning any problems with previous arrests or persecution. If the Officer is satisfied that the claim has merit, he will report it to the Commanding Officer, who will send an immediate message for transmittal to CORAP. If CORAP concurs, they will authorize the District Director, Miami to parole the individual for "humanitarian reasons"; and arrangements will be made for transportation to Miami. In these cases a written statement, or Form I-589(in boarding bag), signed by the individual, must be completed. If the INS Officer has doubts concerning the veracity of the persecution claim, he will forward the questions and answers in the statement or Form I-589, as well as biographic information, (BHRHA) with an info copy to CORAP. After the opinion is received, final determination will be made as to the disposition of the case.

Narrative Report- During the interviews, the INS Officer will also ascertain information for preparation of the narrative report. This report will include the name and description of the vessel, the number of crew and passengers,point of departure, destination, events before and during the voyage, general health of the migrants, general smuggling activities, and a statement that none of the migrants fear being returned to their country. No information concerning an asylum claim will be provided the authorities of that country.

The list of names, etc. and the narrative will be typed. When time is of the essence, you may request that a Coast Guard yeoman assist with the typing. Thirteen copies of each will be made. One each will be provided to the Operations Officer on board the cutter, the Coast Guard Liaison Officer in Port Au Prince, and one for the HMIO office in Miami. The original and the remaining copies will be provided to the U.S. Embassy representative in Port Au Prince for disposition to the Haitian authorities.

* * *